

DECISION

Claim No. 1000129

Province of Infection – Nova Scotia

1. The Claimant applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.
2. By letter dated February 27, 2003, the Administrator denied the claim on the basis that the Claimant had not provided sufficient evidence to establish that she had received blood during the Class Period.
3. The Claimant requested that the Administrator's denial of her claim be reviewed by a Referee.
4. The Administrator's letter of February 27, 2003, denying the claim stated in part:

“In your original application you indicated you were transfused in October 1986 at Dartmouth General Hospital. There were no transfusion records submitted to support this. In cases where the claimant is having difficulty obtaining the transfusion information from the hospital, it is the procedure of the Traceback department to contact Canadian Blood Services to

request their assistance in obtaining transfusion information. The results of this request were summarized in a letter from CBS received January 29, 2003 stating Dartmouth General Hospital has confirmed your records are available however you were not transfused. Therefore, you do not meet the Criteria for compensation, based on Article 3.01 (1a) of the 1986-1990 Hepatitis C Settlement Agreement; because you did not have a blood transfusion between January 1, 1986 and July 1, 1990.”

5. In the Request for Review filed by the Claimant, she outlined the following reasons for wanting to have the Administrator’s decision reviewed:

“I had back surgery and now I have hepatitis C (acute stage) never used needles other than what the hospital gave me. I believe I got this from being in the Health Care Systems care and I did receive a blood product of spinal fluid.”

6. Fund Counsel filed a written submission on September 29, 2003 in which the following facts are recited:

“In the General Claimant Information Form (‘TRAN 1’), [the Claimant] states that she received a blood transfusion in Canada once during the Class Period (January 1, 1986-July 1, 1990). (Claim file, pages 57-61)

In the Blood Transfusion History Form ('TRAN 5'), [the Claimant] states that she was transfused with one unit of blood in October 1986 at the Dartmouth General Hospital in Nova Scotia. The medical condition which led to the blood transfusion is described to be 'back surgery/repair of spinal sac'. (Claim file, pages 72-73)

Dr. Cadegan completed the Treating Physician Form on March 30, 2001. In this form, he states that having regard to the definition of Blood, [the Claimant] did receive a Blood transfusion in the period January 1, 1986 to July 1, 1990. (Claim file, pages 62-66)

The Dartmouth General Hospital has searched its records for the period of August 1986 through to December 1986 and have confirmed that [the Claimant's] patient records are available and she was not transfused. (Claim file, pages 86-87)

As a result of this response, Carol Miller, the Appeal Co-ordinator of the Hepatitis C Claims Centre wrote to Dr. Cadegan to determine the basis of his reply in the Treating Physician Form when he stated that [the Claimant] did receive a blood transfusion in the Class Period. (Claim file, page 88) Dr. Cadegan's office replied stating 'she was not under my care at that time – no med record'. (Claim file, page 90)"

7. The Claimant requested an oral hearing. After a number of unavoidable adjournments, the hearing took place on May 6, 2005. The Claimant, her husband, Fund counsel and the Appeal Coordinator were in attendance.

8. The Claimant's evidence was that she had had a disc removed at the Dartmouth General Hospital in October of 1986. She said she experienced complications and was readmitted to the same hospital a few days later where she underwent a second surgical procedure to repair a nick in her spinal fluid sac. The

Claimant was quite certain that she had received a blood product in connection with the second surgery. She recalled hearing the anaesthetist saying something about “the blood being good” and she remembered seeing three bags of intravenous fluids on her I.V. pole in the recovery room, one of which she said was identified to her by a nurse as being a “blood by-product...spinal fluid”. The Claimant’s husband confirmed the Claimant’s evidence with respect to the various I.V. fluids received by her in the recovery room, including the blood by-product.

9. The Claimant stated at the hearing that she had tried to obtain her medical records from the Dartmouth General Hospital but had never been successful in getting them. Fund counsel suggested that, in fairness to the Claimant, the relevant hospital records should be procured and it was agreed that I would write to the Dartmouth General Hospital requesting same. By letter dated May 9, 2005, I requested that the Dartmouth General Hospital provide me with all records relating to the Claimant’s inpatient care from August 1986 to December 1986. The hospital replied on May 19, 2005 indicating that the Claimant had not been an inpatient at the hospital from August 1986 to December 1986. The hospital was then requested to provide all inpatient records for the Claimant for the entire Class Period from January 1, 1986 to July 1, 1990. The hospital subsequently provided the records in question and copies were forwarded to the

Claimant and Fund counsel on August 15, 2005. Fund counsel was requested to review the records and file a supplemental written submission, following which the Claimant would be given an opportunity to respond.

10. On September 6, 2005, Fund counsel filed the following supplemental submission:

“Re: Request for Review – Reference – [the Claimant] - #1000129

We thank Mr. Outhouse for forwarding the hospital records of the Dartmouth General Hospital (the ‘Records’) in this matter.

Unfortunately, we have not been able to locate anything within the Records which would suggest that [the Claimant] received a blood transfusion at the Dartmouth General Hospital during the Class Period.

Although page 87 of the Records indicates that two units of blood were crossmatched for [the Claimant] on December 13, 1987, there is nothing in the Records to suggest that the crossmatched blood was in fact transfused. A crossmatch is a procedure in which blood is requested and saved in the hospital blood bank, in the event that it may become needed for a transfusion. However, not all blood that is crossmatched is in fact transfused. It is not uncommon for blood which has been crossmatched in anticipation of an operation, never to in fact be transfused, if it turns out not to be needed during that operation. As a result, the fact that a crossmatch has been performed does not demonstrate that a blood transfusion in fact has occurred.

These are the only further submissions of the Administrator in this matter.”

11. As indicated in Fund counsel's submission, the records of the Dartmouth General Hospital indicate that the Claimant was cross-matched for two units of packed cells in preparation for surgery on December 13, 1987. The surgery in question was to repair a "tiny dural laceration" which was apparently related to earlier spinal surgery (laminectomy) on December 3, 1987. As stated in Fund counsel's supplementary submission, there is no indication that the cross-matched units, or either of them, were actually transfused to the Claimant.

12. Because the earlier search of the blood bank records at the hospital only covered the period from August 1986 to December 1986, a further inquiry was made to determine whether the blood bank had any records of the Claimant being transfused in December of 1987. The response received was negative. In fact, Canadian Blood Services confirmed that a search of all blood bank records at the hospital from 1977 to 2005 revealed no evidence of the Claimant ever having been transfused.

13. The Claimant was provided with a copy of Fund counsel's supplementary submission and she was invited to respond to same. However, she did not do so and, on February 6, 2006, she advised my office that she had no further evidence to present.

14. In the end result, therefore, we are faced with a situation where the Claimant has been unable to produce any type of medical record demonstrating that she received a blood transfusion in Canada during the Class Period as required under s. 3.01(1)(a) of the Transfused HCV Plan. On the contrary, the medical records available clearly seem to indicate that the Claimant did not receive a transfusion of blood or blood products in connection with the surgical procedure she underwent at the Dartmouth General Hospital on December 13, 1987. The two units of packed cells for which she was cross-matched on that date have been accounted for and were not transfused to her.

15. Furthermore, the Claimant has not been able to provide any corroborating evidence, independent of her own personal recollection and that of her husband, to establish on a balance of probabilities that she received the blood transfusion in Canada during the Class Period. The Claimant has been given every opportunity to provide such evidence but, unfortunately, she was not able to do so.

16. Justice Winkler, in a recent judgment on a motion by Claimant 1000015 to oppose confirmation of the decision of a referee appointed pursuant to the terms of the Hepatitis C 1986-1990 Class Action Settlement Agreement, made

the following observations about the burden of proof in a case such as the present one:

“11. The Settlement Agreement is clear on the issue of eligibility. A claimant must establish that he or she has both infection with the Hepatitis C virus and receipt of Blood during the class period. Generally, the method by which receipt of Blood is established is through the submission of the medical, clinical, hospital or laboratory records of the claimant. (See s. 3.01(1) (a) of the Transfused Agreement)

12. Where the claimant’s medical records do not indicate the receipt of blood during the class period, the claimant may still be able to establish that he or she received Blood during that time pursuant to s. 3.01(2) which provides:

3.01(2) ...if a claimant cannot comply with the provisions of Section 3.01(1)(a), the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received a Blood transfusion in Canada during the Class Period.

13. In this case, the claimant did not have the supporting medical records demonstrating that he received a Blood transfusion and therefore was attempting to establish a transfusion on alternate evidence under s. 3.01(2). However, the important thing to note about s. 3.01(2) is that the claimant bears the onus of proof on the balance of probabilities. The referee determined that the claimant did not satisfy the onus and therefore upheld the decision of the administrator.”

[emphasis added]

17. Later in the decision, Justice Winkler stated:

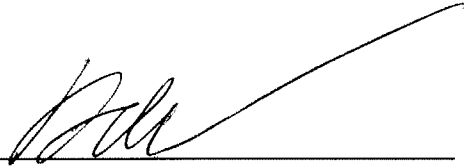
“18. The claims and appeal processes set out in the Agreement are designed so that claimants can represent themselves. In my view, it would be consistent with this objective for referees to address conflicting evidence in their reasons and elaborate as to why particular evidence was preferred. In this case, the underlying records do not indicate that the claimant received a Blood transfusion during any of his visits to the hospitals. It is unfortunate that some records in this case may have been produced after a denial of their existence but having now been produced, the records do not indicate that a blood transfusion was given to the claimant. Similarly, it is not enough to suggest as the claimant does, that the circumstances of the production render the integrity of the records suspect. S. 3.01(2) requires corroborating, or affirmative, evidence of a blood transfusion rather than a demonstration that some of the existing records are either incomplete or conflicting. Establishing the latter would be helpful for credibility purposes when a referee had to weigh the information, or lack thereof, contained in the records against evidence to the contrary but there must still be admissible corroborating evidence that the claimant received Blood, notwithstanding the existence of records indicating otherwise.”

[emphasis added]

18. Regrettably, the Claimant has been unable to establish that she received a blood transfusion during the Class Period. The medical records do not indicate that she was transfused and there is no corroborating evidence to prove, on the balance of probabilities, that she was transfused. Thus, the requirements of proof under s. 3.01(1)(a) and s. 3.01(2) have not been satisfied by the Claimant.

Under these circumstances, I have no alternative but to uphold the Administrator's denial of the Claimant's request for compensation.

DATED at Halifax, Nova Scotia, this 12th day of June, 2006.

A handwritten signature in black ink, appearing to read 'S. Bruce Outhouse', written over a horizontal line. The signature is stylized and extends to the right of the line.

S. BRUCE OUTHOUSE, Q.C.
Referee